

From: "Leitch, David G."
To: "Gonzales, Alberto R.," "Kavanaugh, Brett M."
Subject: Fw:
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Byron York on Owen, below

-----Original Message-----

From: P6/b(6)
To: Leitch, David G. <David_G._Leitch@who.eop.gov>
Sent: Sat Mar 29 06:34:06 2003
Subject:

March 28, 2003 10:30 a.m.
Another Democratic Filibuster?
Democrats prepare to obstruct again — war or no war.

Say you're a Democratic senator. You're filibustering the nomination of Miguel Estrada to a place on the D.C. Circuit Court of Appeals, the first time in history such a tactic has been used against an appellate-court judge. You're taking a lot of criticism, with dozens of editorials in papers across the country condemning your actions, but so far you and 44 other Democrats have held your ground.

Still, you're having a progressively harder time explaining why you're filibustering. You loudly protested that Estrada did not answer your questions, only to have it reported that you had not bothered to submit any questions to the nominee when the White House offered. You demanded that the White House release Justice Department documents Estrada wrote while in the Clinton-era Solicitor General's office, only to have it revealed that you didn't bother to consult any of the former Clinton officials who offered to answer questions about the documents.

That led some observers to question the, uh, sincerity of your motives. But in spite of all that, you've hung tough; in three cloture votes so far, Republicans have not been able to muster more than 55 votes of the 60 needed to break the filibuster. This week, because of the war, there's been no cloture vote at all. Maybe there will be another one next week, and maybe not.

So here's the question: Given all that, are you in the mood to launch an unprecedented second filibuster of an appeals court nominee?

Absolutely.

The next target is likely to be Priscilla Owen, the Texas supreme-court justice who is president's nominee to a seat on the Fifth Circuit Court of Appeals. Owen, who was voted down by the Senate Judiciary Committee last year when it was controlled by Democrats, was approved yesterday by the same committee under GOP control. The vote was straight party line: All ten Republicans voted for Owen, and all nine Democrats voted against her.

Democrats have not yet committed to a filibuster of the nomination in the full Senate, but leaders of liberal interest groups, who often call the shots in these matters — people like Kate Michelman of NARAL, Nan Aron of the Alliance for Justice, and Ralph Neas of People for the American Way — say they expect Democrats to filibuster.

But on what grounds? The biggest objection to Owen concerns her rulings on a Texas law which requires underage girls who want to have an abortion to notify their parents (not get their consent, just notify them). The law also allows girls who fear their parents' reaction to seek a court-ordered bypass of the notification requirement. While Owen has not questioned the basic legal right to an abortion, she has sometimes taken a more limited view of the bypass option than other justices on the Texas high court.

That was enough to persuade hard-core Democrats to vote against her in the Judiciary Committee. But is it enough to sustain a full-fledged filibuster?

Probably not. The dilemma for Democrats is that parental-notification laws are quite popular around the country; polls show more than 80 percent of Americans approve of them. Given that political reality, it seems unlikely that Democrats would use such an unpopular issue as a reason to filibuster.

Rather, it appears that, just as they did with Estrada, Democrats are preparing to object to Owen on mostly procedural grounds. Democrats had no evidence to suggest that Estrada was not qualified, so they claimed that he (and the White House) had not cooperated with the Senate in the process of confirmation. Now, with Owen, they might again skip the substance and resort to a process argument.

Nan Aron of the Alliance for Justice says there are "very serious procedural issues" with the nomination. "Owen is a nominee who has already been defeated by the Senate," Aron said after yesterday's vote. "It's inappropriate and unprecedented for her to have been renominated having already been defeated. We believe a filibuster will be just as easy to organize for her as Estrada."

Aron's statement suggests that Democrats will base a filibuster of Owen on grounds that her renomination was a slap in the face of Democrats who had voted her down last year. While that argument has no actual merit — measures that die in one Congress have often found life in a later Congress after a change in party control — it could prove effective in uniting Democrats who might otherwise be hesitant to object to Owen on a popular issue like parental notification.

In short, the Democratic argument will not be that Owen is not qualified. It will be that the White House can't push us around.

So look for another stalemate in the Senate. The Owen strategy, along with Estrada and recent votes on the budget and oil drilling in Alaska, show the Democrats feel perfectly comfortable in pushing the president around, war or no war. What remains to be seen is how hard the president will push back.

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